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IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1972

No. _____

FREEMAN W. SAILOR - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

AND

LOUIS R. KLOTTER - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS, FREEMAN W. SAILOR AND LOUIS R. KLOTTER

May it please the Court:

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, decided on April 25, 1972 in the above entitled actions is printed in Petitioner's Appendix at page .... and has not yet been officially reported.

JURISDICTION

The date of entry of the judgment herein sought to be reviewed is April 25, 1972. This Court has jurisdiction to hear this case under the provisions of 28 U.S.C. §1346(a)(1).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the IRS can compel an individual, during the year 1969, who is allegedly indulging in gaming operations, to file Forms 11C and 730 with the Department, which forms are of an incriminating nature, for the purpose of fixing the amount of the alleged excise taxes due for the years 1968 and a portion of the year 1969, with the further provision that unless these incriminating forms are filed with the Department that it would (and did) fix the amount of excise taxes on gaming operations based upon information obtained upon Forms 11C and 730 filed by the Petitioners in the year 1967.

II(a). Or in different phraseology, were the methods of IRS under the federal wagering tax statutes in these situations consistent with the limitations granted by the privilege against self incrimination guaranteed by the Fifth Amendment to the Constitution of the United States.

II(b). Or again, in different terms, the question presented is: Can there be a compulsory discovery by compelling the production by an individual of his

private books or papers to convict him of crime or forfeit his property.

III. Whether or not Sailor and Klotter are entitled to a trial on the merits of their claims for refund and was the District Court justified in sustaining a motion for judgment on the pleadings in each case.

CONSTITUTIONAL PROVISIONS

The Constitutional Provision herein involved is the Fifth Amendment to the Constitution of the United States which is set out verbatim as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE AS TO FREEMAN W. SAILOR

On or about November 19, 1969, Freeman W. Sailor was served with Examination Reports of an Internal Revenue Agent. He was charged with being delinquent for failing to pay the $50-tax required by 26 USC 4411 for the period July 1, 1969 through June 30, 1970. As

stated in the report, the tax was assessed because of Sailor's "failure to file Form 11C and pay the tax." (Sailor Exhibit No. A-1). Sailor was also charged with failure to pay $31,464.80 as required by 26 USC 4401 for the period January 1, 1968 through August 1969, including the sum of $1,573.24 plus interest for the month of July, 1968. The reason given in the Report for the assessment is "the principal cause of tax was the failure to file excise tax returns, Forms 730 for the period January 1, 1968 through August 31, 1969." The Report continues as follows:

> "Also since the taxpayer refused to furnish records pertaining to gross wagers received the delinquint tax was computed on the basis of the average gross wager reported on tax return, form 730, for the calendar year 1967" (Sailor Exhibit A-2).

The above assessments were duly protested by Sailor as having been arbitrarily assessed in violation of law (Sailor Exhibit B with enclosures).

On April 10, 1970 the Protest was denied (Sailor Exhibits C-1 and C-2).

On June 12, 1970 the alleged tax under Form 11C in the amount of $52.78 was paid and a Claim for Refund filed the same day (Sailor Exhibit D-1). On June 12, 1970 the alleged tax under Form 730 for the month of July 1969 in the amount of $1,645.08 was paid and Claim for Refund filed the same day (Sailor Exhibit D-2). On October 8, 1970 the Claims for Refund were denied (Sailor Exhibit E-1 and E-2).

This action for the refund of the taxes erroneously, arbitrarily and illegally assessed was instituted by Sailor.

Sailor filed his complaint on December 23, 1970. An answer was filed by the United States of America (hereinafter called "United States") and later an amended answer and counter-claim. A reply was filed to the counter-claim.

On May 7, 1971 a motion for judgment on the pleadings was made by the United States. On May 20, 1971, judgment was entered for the United States on the motion for judgment on the pleadings. On May 25, 1971, motion was made by Sailor to set aside order of May 20, 1971 sustaining motion for judgment on the pleadings. On September 20, 1971, a memorandum and order was filed by the District Court overruling Sailor's motion to set aside the Court's order of May 20, 1971. Notice of appeal to the United States Court of Appeals, 6th Circuit, was promptly filed. The case was duly heard by the Court and the appeal was dismissed and the judgment of the District Court affirmed.

STATEMENT OF THE CASE AS TO LOUIS R. KLOTTER

On or about August 25, 1969, Louis R. Klotter was served with Examination Reports of an Internal Revenue Agent. Klotter was charged with being delinquent for failure to pay the $50-tax required by USC 26, § 4411 for the period July 1, 1968 through June 30, 1969. As stated in the Report, the tax was assessed

because of Klotter's "failure to file Form 11C and pay the tax" (Klotter Exhibit No. A-1). Klotter was also charged with failure to pay $52,883.18 as required by 26 USC § 4401 for the period from December 1, 1967 through June 30, 1969, including the sum of $2,771.96 plus interest for the month of July 1968. The reason given in the Report for the assessment is "the principal cause of tax was the failure to file excise tax returns, Forms 730 for the period December 1, 1967 through June 30, 1969." The Report continues as follows:

> "Also since the taxpayer refused to furnish records pertaining to gross wagers received the delinquent tax was computed on the basis of the average gross wager reported on tax return, form 730, for the calendar year 1967" (Klotter Exhibit A-2).

The above assessments were duly protested by Klotter as having been erroneously, arbitrarily and illegally assessed in violation of law (Klotter Exhibit B).

On December 16, 1969 the Protest was denied (Klotter Exhibits C-1 and C-2).

On May 13, 1970 the alleged tax under Form 11C in the amount of $52.78 was paid and a claim for refund filed the same day (Klotter Exhibit D-1). On the same date the alleged tax under Form 730 for the month of July 1968 in the amount of $3,054.62 was paid and a claim for refund filed (Klotter Exhibit D-2). On October 8, 1970 the claims for refund were denied (Klotter Exhibits E-1 and E-2).

This action for the refund of the taxes erroneously, arbitrarily and illegally assessed was instituted by Klotter.

Klotter filed his complaint for refund on December 23, 1970. An answer was duly filed by the United States and an amended answer and counter-claim was also filed. Reply to the counter-claim was filed. A pre-trial conference was had on September 8, 1971 and a memorandum was submitted by Klotter. On October 8, 1971 a motion was made by the United States for a judgment on the pleadings. A memorandum and order was filed by the Court on October 14, 1971 sustaining the motion of the United States for judgment on the pleadings. Notice of appeal to the United States Court of Appeals, 6th Circuit, was promptly filed. The case was duly heard by the Court and the appeal was dismissed and the judgment of the District Court affirmed.

The actions of Sailor (No. 6824) and Klotter (No. 6825) were consolidated by the District Court as companion cases.

In each of the above cases, all statutory procedures were followed required for the filing of an action for refund of taxes erroneously, arbitrarily or illegally collected. The District Court failed to assign the cases for trial and dismissed both cases.

ARGUMENT

I. The Legal Status of Federal Statutes Taxing Wagers.

Almost a century ago, this Court, through Justice Bradley, concurred in the contentions which we make in this action, as shown by the following excerpt from the case of *Boyd* v. *United States,* 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, which reads as follows:

> "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

This case has been cited with approval by numerous courts, including the opinion from the 7th Circuit, to-wit, *U. S.* v. *U. S. Coin and Currency Amount of $8674,* 393 F. 2d 499 (1968).

On January 28, 1968, the Supreme Court decided the cases of *Marchetti* v. *United States,* 390 U. S. 39, 88 S. Ct. 697 (1968) and *Grosso* v. *United States,* 390 U. S. 62, 88 S. Ct. 709 (1968). In these two cases dealing with convictions under 26 USC §§ 4401, 4411, 4412, the issues are as stated by the Court in *Marchetti,* 390 U. S. 39, 88 S. Ct. 699:

"The provisions in issue here are part of an interrelated statutory system for taxing wagers. The system is broadly as follows. Section 4401 of Title 26 imposes upon those engaged in the business of accepting wagers an excise tax of 10% on the gross amount of all wagers they accept, including the value of changes purchased in lotteries conducted for profit. Parimutuel wagering enterprises, coin-operated devices, and state-conducted sweepstakes are expressly excluded from taxation. 26 U.S.C. § 4402 (1964 ed. Supp. II). Section 4411 imposes in addition an occupational tax of $50 annually, both upon those subject to taxation under § 4401 and upon those who receive wagers on their behalf.

"The taxes are supplemented by ancillary provisions calculated to assure their collection. In particular, § 4412 requires those liable for the occupational tax to register each year with the director of their local internal revenue district. The registrants must submit Internal Revenue Service Form 11-C, and upon it must provide their residence and business addresses, must indicate whether they are engaged in the business of accepting wagers, and must list the names and addresses of their agents and employees. The statutory obligations to register and to pay the occupational tax are essentially inseparable elements of a single registration procedure; Form 11-C thus constitutes both the application for registration and the return for the occupational tax.

"In addition, registrants are obligated to post the revenue stamps which denote payment of the occupational tax 'conspiciously' in their principal places of business, or, if they lack such places, to

keep the stamps on their persons, and to exhibit them upon demand to any Treasury officer. 26 U.S.C. §6806(c). They are required to preserve daily records indicating the gross amount of the wagers as to which they are liable for taxation, and to permit inspection of their books of account. 26 U.S.C. §§ 4403, 4423. *Moreover, each principal internal revenue office is instructed to maintain for public inspection a listing of all who have paid the occupational tax, and to provide certified copies of the listing upon request to any state or local prosecuting officer.* 26 U.S.C. § 6107. Finally, payment of the wagering taxes is declared not to 'exempt any person from any penalty provided by a law of the United States or of any State for engaging' in any taxable activity. 26 U.S.C. § 4422." (Emphasis added.)

The Court further states at 390 U. S. 44, 88 S. Ct. 700:

"The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases. See, e. g., License Tax Cases, 5 Wall. 462, 18 L. Ed. 497. *The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment.*" (Emphasis added.)

After reviewing the over-all effect of the statutes in question and the provisions of all of the states declaring such gambling activities to be unlawful and subject to prosecution, the Court continued at 390 U. S. 48, 88 S. Ct. 702:

"In these circumstances, it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination. Reg. v. Boyes, 1 B. & S. 311, 330; Brown v. Walker, 161 U. S. 591, 599-600, 16 S. Ct. 644, 647, 648, 40 L. Ed. 819; Rogers v. United States, 340 U. S. 367, 374, 71 S. Ct. 438, 442, 95 L. Ed. 344. *Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt. Unlike the income tax return in question in United States* v. *Sullivan*, 274 U. S. 259, 47 S. Ct. 607, 71 L. Ed. 1037, *every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner; the application of the constitutional privilege to the entire registration procedure was in this instance neither 'extreme' nor 'extravagent.' See id., at* 263, 47 S. Ct. 607. *It would appear to follow that petitioner's assertion of the privilege as a defense to this prosecution was entire proper, and accordingly should have sufficed to prevent his conviction.*" (Emphasis added.)

Thus we see that the Court recognized the full import of the various statutory provisions not only to require the taxpayer to give incriminating information but that such requirements of the present statutes for registration and payment of the occupational tax are inextricably connected. This will be seen to be paramount in the instant case as will be pointed out later.

In refusing the request of the Government to permit continued enforcement of the registration and occupational tax provisions by judicial elimination of the unconstitutional provisions, the Court said at 390 U. S. 58, 88 S. Ct. 707:

> "Finally, we have been urged by the United States to permit continued enforcement of the registration and occupational tax provisions, despite the demands of the constitutional privilege, by shielding the privilege's claimants through the imposition of restrictions upon the use by federal and state authorities of information obtained as a consequence of compliance with the wagering tax requirements. It is suggested that these restrictions might be similar to those imposed by the Courts in Murphy v. Waterfront Commission, 378 U. S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678.
>
> "The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers. We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful. Nor can it be doubted that the privilege against self-incrimination may

not properly be asserted if other protection is granted which 'is so broad as to have the same extent in scope and effect' as the privilege itself. Counselman v. Hitchcock, 142 U. S. 547, 585, 12 S. Ct. 195, 206, 35 L. Ed. 1110. The Government's suggestion is thus in principle an attractive and apparently practical resolution of the difficult problem before us. Compare Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 159; and McKay, supra, at 232. Nonetheless, we think that it would be entirely inappropriate in the circumstances here for the Court to impose such restrictions.

"The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities. See 26 U.S.C. § 6107. This has evidently been the consistent practice of the Revenue Service. We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes. Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes; the federal requirements would thus be protected, only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling. *We cannot know how Congress would assess the competing demands of the federal treas-*

ury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values. We therefore must decide that it would be improper for the Court to impose restrictions of the kind urged by the United States. (Emphasis added.)

"We are fully cognizant of the importance for the United States' various fiscal and regulatory functions of timely and accurate information, compare Mansfield, supra, and Meltzer, Required Records, the McCarran Act, and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687; but other methods entirely consistent with constitutional limitations, exist by which Congess may obtain such information. See generally Counselman v. Hitchcock, supra, 142 U. S. at 585, 12 S. Ct. at 206, compare Murphy v. Waterfront Commission, supra. Accordingly, nothing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes.

"Nonetheless, we can only conclude, under the wagering tax system as presently written, that petitioner properly asserted the privilege against self-incrimination, and that his assertion should have provided a complete defense to this prosecution. This defense should have reached both the substantive counts for failure to register and to pay the occupational tax, and the count for conspiracy to evade payment of the tax. We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible: We hold only that those who properly

assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. *If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties presecribed by the wagering tax statutes.*" (Emphasis added.)

In *Grosso* v. *United States,* 390 U. S. 66, 67, 68, 88 S. W. 2d 712, 713, it is said:

". . . Nothing in the pertinent statutes or regulations contemplates payment of the tax without submission of the return, and we are informed by the United States that if the return does not accompany the tax payment, 'the money is not accepted.' Brief for the United States on Reargument 39, n. 5. We must conclude that here, as in *Albertson,* the validity under the Constitution of criminal prosecutions for willful failure to pay the excise tax may properly be determined only after assessment of the hazards of incrimination which would result from 'literal and full compliance' with all the statutory requirements. 382 U. S., at 78, 865 S. Ct., at 199.

"Second, although there is no statutory instruction, as there is for the occupational tax, that state and local prosecuting officers be provided listings of those who have paid the excise tax, *neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax.* Moreover, it appears that the Revenue Service, evidently acting under the

authority of certain general statutory provisions, has undertaken to tender this information to interest prosecuting authorities. We can only conclude that those liable for payment of the excise tax reasonably may expect *that information obtainable from its payment, or from submission of Form 730,* will ultimately be proffered to state and federal prosecuting officers.

"In these circumstances, it would be impossible to say that the hazards of incrimination which stem from the obligation to pay the excise tax and to file Form 730 are 'imaginary and unsubstantial.' Reg. v. Boyes, 1 B. & S. 311, 330; Brown v. Walker, 161 U. S. 591, 599-600, 16 S. Ct. 644, 647-648, 40 L. Ed. 819. The criminal penalties for wagering with which petitioner is threatened are scarcely 'remote possibilities out of the ordinary course of the law,' Heike v. United States, 227 U. S. 131, 144, 33 S. Ct. 226, 228, 57 L. Ed. 450; yet he is obliged, on pain of criminal prosecution, to provide information which would readily incriminate him, and which he may reasonably expect would be provided to prosecuting authorities. These hazards of incrimination can only be characterized as 'real and appreciable,' . . .

". . . It need only be added that the requirements associated with the excise tax are directed wholly to past and present wagering activities; they lack even the illusory prospectivity which characterizes the special occupational tax and registration requirements.

* * * * * * *

"Here, as in *Marchetti,* the stautory obligations are directed almost exclusively to individuals

> inherently suspect of criminal activities. The principal interest of the United States must be assumed to be the collection of revenue, and not the prosecution of gamblers, United States v. Calamaro, 354 U. S. 351, 358, 77 S. Ct. 1138, 1143, 1 L. Ed. 2d 1394; but we cannot ignore either the characteristics of the activities about which information is sought, or the composition of the group to which the inquiries are made. These collateral circumstances, in combination with Congress' apparent wish that any information obtained as a consequence of the wagering taxes be made available to prosecuting authorities, readily suffice to distinguish these requirements from those at issue in *Shapiro*. Moreover, the information demanded here lacks every characteristic of a public document. No doubt it is desired by the United States, but we have concluded, for reasons indicated in *Marchetti,* that this alone does not render information 'public', and thus does not deprive it of constitutional protection." (Emphasis added.)

From the foregoing, it is clear that the Court did *not* say that Congress could *not* pass legislation that would constitutionally allow the IRS to obtain information and enforce the collection of taxes on wagering. But the Court *did* say that the present law does not meet the constitutional standards. It will be noted that the Court specifically emphasizes that the Congress was the proper branch of Government to make the necessary changes. What has Congress done?

II. Congress Has Failed to Pass a Constitutionally Permissible Statute for the Purpose of Taxing Wagers.

On July 2, 1968, the then Secretary of the Treasury, Honorable Henry H. Fowler, forwarded to the President of the Senate and to the Speaker of the House, proposed amendments to the wagering tax law to meet the objections and suggestions of *Marchetti* and *Grosso*. As summarized by the Secretary, the proposed legislation would:

> "(1) Insure the constitutional rights of taxpayers by placing statutory restrictions upon the disclosure and use of information obtained through taxpayer compliance with the wagering tax laws;
>
> "(2) Increase the coverage and the amount of the occupational taxes under the wagering tax laws; and
>
> "(3) Authorize the grant of immunity to essential witnesses who would otherwise have the right to decline to provide information concerning wagering tax matters."

The Secretary not only forwarded a proposed bill but included an analysis. He was joined by the then Attorney General in seeking Congressional action. The bill was then introduced but no action was taken in the 90th Congress. Subsequently, on January 3, 1969 the same bill was reintroduced in the First Session of the 91st Congress as HR 322 and referred to the Committee on Ways and Means. No action has been taken on this bill. (A copy of the letter of the Secretary of the Treasury, of HR 322, a copy of the Proposed Bill and

the Technical Analysis is attached for the information of the Court.

A reading of the bill will show that it remedies the defects of the present law. However, in spite of the fact that Congress has not changed the law, the Government is attempting to apply the law as it existed before *Marchetti* and *Grosso*. We hold this to be arbitrary and without legal justification.

It is the contention of Sailor and Klotter that in the particular cases at bar that the Government acted illegally in justifying its arbitrary assessments by requiring Sailor and Klotter to file Form 11C which required them to declare their present intent to commence gambling activities and also to force them to file Form 730 which achieves the same purpose. When Sailor and Klotter elected not to incriminate themselves, the IRS then used the information obtained from Form 730 in 1967 before the Supreme Court struck down the unconstitutional provisions of the present Act.

III. In the Absence of a Constitutionally Permissible Law to Tax Wagers the IRS Cannot Arbitrarily and Illegally Assess Taxes Based Upon Information That the Supreme Court Has Held To Be in Violation of the Fifth Amendment.

In the absence of such legislation, the IRS cannot arbitrarily and illegally assess taxes based upon information that the Supreme Court has held to be in violation of the Fifth Amendment. As pointed out by the Supreme Court in *Marchetti* v. *U. S., supra:*

> ". . . the application of the constitutional privilege to the entire registration procedure was in this instance neither 'extreme' nor 'extravagant'."

Also at 390 U. S. 52, 88 S. Ct. 705:

> ". . . Further, the acquisition of a federal gambling tax stamp, requiring as it does the declaration of a present intent to commence gambling activities, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes."

The interpretation of the decisions in *Marchetti* and *Grosso* as contended for by Sailor and Klotter was clearly understood by the minority of the Court. Chief Justice Warren, in his dissenting opinion, said at 390 U. S. 77, 88 S. Ct. 718:

> ". . . I am puzzled by the reasoning process which leads it to that result. The Court professes to recognize and accept the power of Congress legitimately to impose taxes on activities which have been declared unlawful by federal or state statutes. Yet, by its sweeping declaration that the congressional scheme for enforcing and collecting the taxes imposed on wagers and gamblers is unconstitutional, the Court has stripped from Congress the power to make its taxing scheme effective."

The same conclusion was likewise reached by the Supreme Court in *United States* v. *U. S. Coin &*

Currency, 401 U. S. 715, 91 S. Ct. 1041 (1971) dealing with a forfeiture. We submit that the language of the Court substantiates our contention that the procedure adopted in the case at bar was arbitrary and illegal. The Court said at page 1043:

> "The Government's principal argument turns upon an exceedingly narrow construction of our decisions in *Marchetti* and *Grosso.* In those cases we took pains to make it clear that the Court in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities. *It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question.* The statute commanded that gamblers submit special registration statements and tax returns that contained information which could well incriminate them in many circumstances. Because the risk of self-incrimination was substantial, we held that a Fifth Amendment privilege could be raised as a defense to a criminal prosecution charging failure to file the required forms. Since it was only this method of tax collection which was subject to constitutional objection, we indicated that the Government remained free to collect taxes due under the statute so long as it did not attempt to punish the taxpayer for his failure to file the required documents." (Emphasis added.)

IV. The District Court Erred in Dismissing the Cases for Refund.

Coming now to Question III for Review, the alleged error of the District Court in dismissing these cases on a motion for judgment on the pleadings, we submit that the procedure was contrary to the law and further, it is in conflict with the late case of *Williamson* v. *U. S.* (7th Circuit), 27 AFR 2d 71-1194 (April 8, 1971). In this action, the Court dismissed the complaint of the taxpayer who was seeking a refund for taxes paid for much the same reasons as indicated by the District Court in this case. However, following the authority of the Supreme Court in *United States* v. *U. S. Coin & Currency,* 401 U. S. 715, 91 S. Ct. 1041 (1971) the Court of Appeals reversed and sent the case back to the District Court "to reinstate the complaint and order the Internal Revenue Service to file an answer thereto." The Court said:

> "Relying on Kisting v. Westchester Fire Insurance Co., 290 F. Supp. 141, 149 (W. D. Wis. 1968), aff'd 416 F. 2d 967 (7th Cir. 1969), the I.R.S. counters that a plaintiff in a civil suit is not protected by the Fifth Amendment. While we believe, as did *Kisting,* that the Fifth Amendment does not apply to a plaintiff seeking affirmative relief in a civil suit, we do not think that the appellant initiated this lawsuit in the sense contemplated by *Kisting.* It was the assessment by the I.R.S. that initiated a series of procedures by which the appellant now finds himself a plaintiff in this refund suit. United States v. Second National

Bank of Nashua, N. H., 48 F.R.D. 268 (D. N.H. 1969). See De Vita v. Sills, 42 F. 2d 1172, 1178-79 (3d Cir. 1970); United States v. Kordel, 397 U. S. 1 (1970). The money seized by the I.R.S. remains the property of the plaintiff subject to a claim which in effect amounts to a lien. The crucial issune in this case, no matter who is designated as plaintiff or defendant, is Williamson's tax liability to the I.R.S. The operative effect of 26 U.S.C. §7422, 'civil actions for refund,' is to make the taxpayer a plaintiff herein and to place the burden on him of proving the exact amount owed."

The plaintiff-appellant in the *Williamson* case, *supra,* is in exactly the same position as Sailor and Klotter in these actions and that case should be controlling. The Government never saw fit to appeal this decision and we naturally assume that its views were in accordance with those expressed by the Court.

In *United States* v. *United States Coin & Cur. Amount of $8,674.00,* 393 F. 2d 499 (1968) (7th Cir.) the Court quotes from *United States* v. *Marchetti, supra,* the following:

> "'"real and appreciable", and not merely "imaginary and unsubstantial," hazards of self-incrimination' (390 U. S. at p. 48, 88 S. Ct. at p. 702)."
>
> "Claimant Angelini would have subjected himself to exactly the same hazards by complying. In this respect, *Marchetti* and this case are the same. But the consequences of non-compliance are not the same in the two cases. The prospect of a

felony conviction involved in *Marchetti* of course has a greater coercive effect than the possible loss of money involved herein. On the other hand, the prospect of losing in excess of $8,000 has a substantial coercive effect. In this respect, the landmark case of Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, is controlling. *Boyd* was a civil forfeiture action in which the claimant was given a choice between producing a possibly incriminating document and forfeiting the property. The Court held that such a choice was impermissible under the Fourth and Fifth Amendments. See Garrity v. State of New Jersey, 385 U. S. 493, 496-497, 87 S. Ct. 616, 17 L. Ed. 2d 562, which reaffirms and follows Boyd.

"The only apparent purpose of 26 U.S.C. §7302, as applied here, is to punish violators of Sections 4411 and 4412 of the Internal Revenue Code by taking away money used in committing the violations. . . . As a practical matter, *Marchetti* means that such violations are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture."

The above case was affirmed in *U. S.* v. *U. S. Coin & Currency,* 401 U. S. 715, 91 S. Ct. 1041 (1971) *supra.*

V. The Court Cannot Do Indirectly What It Cannot Do Directly.

The District Court, in its Memorandum and Order, states:

"However, when a taxpayer fails or refuses to file Form 730 there is a code provision that allows

> the taxing authorities to make such return from their own knowledge and from such information as can be obtained through testimony or otherwise. See U.S.C. 26 Section 6020B."

As the Supreme Court has heretofore pointed out in the *Marchetti* case, *supra,* there is a distinct difference which has long been recognized between the reliance upon "income taxes" and "excise taxes." The Federal Income Tax Law fully protects the taxpayer in that the information given by him is confidential except under certain circumstances. On the other hand, the Gambling Tax Law specifically provides that the information that these taxpayers were required to give should be available to all State's prosecuting authorities.

May we, at the expense of repetition, impress upon the Court the fact that it is our contention that it is the manner and the method pursued by the IRS in attempting to collect these excise taxes which we criticize and condemn. As said in *Marchetti, supra:*

> "The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful. . . . The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment."

As pointed out above, Sailor and Klotter object to the method used by the IRS in their particular cases.

The IRS, as shown by the exhibits filed herein, relied completely on the failure of the taxpayers to file Forms 11C and 730 and then used the very information contained in Forms 11C and 730 which had been filed, prior to the *Marchetti* and *Grosso* cases, by Sailor and Klotter. The IRS made no effort to use independent sources to obtain the information and the District Court, by sustaining a Motion for Judgment on the Pleadings, in each case, has excluded Sailor and Klotter from prosecuting their cases for a refund of the money which has been arbitrarily, illegally and unlawfully assessed against them.

CONCLUSION—RELIEF SOUGHT

In conclusion, we again reiterate the fact that:

1. We do not contend that money obtained through wagering transactions is not subject to taxation.

2. It is our earnest contention, however, that the Government cannot proceed in the manner and method which it has sought to do in the present actions, in attempting to collect what it alleges is due it. As the Supreme Court said in *United States* v. *U. S. Coin & Currency,* 401 U. S. 715, 91 S. Ct. 1041 (1971):

> "It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question. The statute commanded that gamblers submit special registration statements and tax returns that contained information which could well incriminate them in many circumstances."

3. As we have heretofore pointed out, the IRS states that it bases its claim on the failure of Sailor and Klotter to file the forms which would necessarily incriminate them in that under the present law the Government is required to give the prosecuting officials of the Commonwealth of Kentucky all information furnished it by Sailor and Klotter.

4. We again call the Court's attention to the fact that without any information other than the Government's allegations, there is no basis for the District Court's action in rendering a judgment such as has been done in the foregoing actions. We, therefore request this Court to reverse the judgment of the United States Court of Appeals for the Sixth Circiut and to require the IRS to base its assessment on the legal testimony which it could easily ascertain through its horde of agents, the FBI or the procurement of bank and other records.

Respectfully submitted,

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Nos. 71-2029 and 71-2057

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

FREEMAN W. SAILER - - - - *Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA - - *Defendant-Appellee*

LOUIS R. KLOTTER - - - - *Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA - - *Defendant-Appellee*

ORDER—Filed April 25, 1972

Before: CELEBREZZE and PECK, Circuit Judges, and RUBIN, District Judge.*

In these actions plaintiffs-appellants seek to recover taxes paid by them on the ground of alleged unconstitutionality of the federal wagering tax provisions, 26 U.S.C. §§ 4411 and 4401, under which such taxes were assessed. The Court being fully advised by the record on appeal, the briefs and oral arguments of counsel has concluded that the contentions of the plaintiffs-appellants are without merit, and accordingly, for the reasons set forth in the Memorandum Opinion filed by District Judge Rhodes Bratcher,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

Entered By Order of the Court
/s/ James A. Higgins
Clerk

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*Honorable Carl B. Rubin, United States District Court for the Southern District of Ohio, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1673

FREEMAN W. SAILOR, PETITIONER

v.

UNITED STATES OF AMERICA

LOUIS R. KLOTTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. 29). The opinions and orders of the district court (Supp. R. 5, 16)[1] are not officially reported.

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[1] "Supp. R." references are to the supplemental appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1972 (Pet. App. 29). The petition for a writ of certiorari was filed on June 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that the assessments of wagering excise and occupational taxes made against petitioners pursuant to Sections 4401 and 4411 of the Internal Revenue Code of 1954 were constitutionally permissible.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 4401. IMPOSITION OF TAX.
>
> (a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> * * * * *
>
> (c) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. * * *

SEC. 4411. IMPOSITION OF TAX.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

STATEMENT

Timely and proper assessments of wagering excise and occupational taxes were made against petitioners. The assessments of the wagering excise taxes covered a period of appoximately one and one-half years for each petitioner and were based on the average gross wagers reported on wagering tax returns (Form 730) filed by petitioners in the prior year (1967). Petitioners each paid the assessed occupational tax and interest and one month's assessed wagering excise tax and interest, and initiated these actions for refund of the amounts so paid. The government counterclaimed for the assessed but unpaid wagering excise taxes and interest. The district court granted the government's motions for judgments on the pleadings and entered judgments for the government. (Supp. R. 2-3, 4-9, 13-14, 16-18.) The court of appeals affirmed (Pet. App. 29).

The decision below, affirming the district court's orders, is correct and is in accord with the decisions of this and other courts. There is no conflict or other reason for further review.

ARGUMENT

1. Petitioners apparently contend (Pet. 17-18) that the wagering excise and occupational taxes were held unconstitutional by this Court in *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715. These cases, however, merely held that criminal punishment, or sanctions tantamount to criminal punishment (forfeiture), for noncompliance with the wagering excise and occupational tax provisions contravene the privilege against self-incrimination. In *Grosso* (390 U.S. at 70 fn. 7), the Court carefully pointed out that it was not holding "that a proper claim of privilege extinguishes liability for taxation * * * [but only that it] precludes a criminal conviction." Likewise, in *Marchetti* (390 U.S. at 61) the Court emphasized—

> that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

In *U.S. Coin & Currency* (401 U.S. at 717), *supra*, the Court reaffirmed its position in *Marchetti* and *Grosso* by stating that it "in no way doubted the Government's power to assess and collect taxes on unlawful gambling activities." Here, of course, unlike the situation in the aforementioned cases, the government is seeking neither a criminal conviction nor a forfeiture, but only to assess and collect taxes. All

other courts of appeals which have passed on the question have resolved the issue in the same way as did the court below. *E.g.*, *Hamilton* v. *United States*, 429 F. 2d 427 (C.A. 2), certiorari denied, 401 U.S. 913; *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), certiorari denied, 402 U.S. 978; *Urban* v. *United States*, 445 F. 2d 641 (C.A. 5), certiorari denied, 404 U.S. 1015; *Cole* v. *Cardoza*, 441 F. 2d 1337 (C.A. 6); *Collins* v. *Daly*, 437 F. 2d 736, 739 (C.A. 7).

2. Petitioners next contend (Pet. 19-21, 25-26) that the government's method of assessing and collecting these taxes violates their Fifth Amendment rights since, it is argued, they can only defend against the assessments by incriminating themselves. But if defense against assessment of these taxes required disclosure of incriminating information, petitioners' remedy would be to move to suppress the incriminating testimony and its fruits in any subsequent criminal prosecution in which its use might be sought. *United States* v. *Blue*, 384 U.S. 251. Since there was no substantial danger to petitioners that they would prejudice themselves by self-incriminating statements in defeating the assessments or maintaining their refund suits, they cannot claim the advantage of the privilege. See *Ullmann* v. *United States*, 350 U.S. 422, 439; *Zicarelli* v. *New Jersey State Commission*, No. 69-4, decided May 22, 1972; *Bowers* v. *United States*, 423 F. 2d 1207 (C.A. 5); *Urban* v. *United States*, *supra*.

The petitioners also argue (Pet. 19, 26) that the assessments violate their constitutional rights since

they are based upon information obtained from wagering excise tax returns filed by them for a prior *pre-Marchetti* year. The government, however, is required to make assessments of the correct tax due, and where a taxpayer refuses (even upon constitutional grounds) to furnish the information on which such assessments are based, the taxing authorities, relying on their own knowledge or on such information as can be otherwise obtained, are permitted to prepare returns on which the assessments can be predicated. See Section 6020(b) of the Internal Revenue Code of 1954. In this instance, the district director used information obtained from returns filed by the taxpayers for prior periods. The evidentiary use of pre-*Marchetti* returns has been upheld by this Court in *Mackey* v. *United States*, 401 U.S. 667. And in *United States* v. *Knox*, 396 U.S. 77, 80 fn. 3, this Court stated that the requirement that wagering tax returns be filed had not been held unconstitutional in *Marchetti*.

3. Petitioners finally assert (Pet. 22-24) that the district court erred in dismissing their refund suits on the government's motion for judgment on the pleadings. The sole ground for recovery set forth by petitioners in their claims for refund and in their complaints was the constitutionality of the wagering occupational and excise taxes. As pointed out above, this Court in *Grosso* and *Marchetti* specifically stated that these taxes are not constitutionally impermissible. Thus, since petitioners have failed to set forth even an arguable legal basis on which they could

prevail, the district court properly granted the government's motions for judgment on the pleadings.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1972.

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